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No. 662

Supreme Court of the United States

October Term, 1941

WILLIAM (BILL) FLIPPIN, JACK BAUGH AND TUDE PURKEY,
Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

October Term, 1941

No. ------

WILLIAM (BILL) FLIPPIN, JACK BAUGH AND TUDE PURKEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matters Involved.

COME Now, William (Bill) Flippin, Jack Baugh and Tude Purkey, petitioners herein, and praying for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, respectfully show unto the Court that they were convicted in the United States District Court in and for the Fort Smith Division of the Western District of Arkansas for violation of Sec. 88, Tit. 18, U.S.C.A., i. e., conspiracy to violate Sec. 3 of the Liquor Enforcement Act of 1936 (27 U.S.C.A. 223) and that on the 29th day of June, 1940, petitioners were sentenced by the trial court as follows, to-wit:

William (Bill) Flippin, two years imprisonment and a fine in the sum of $2,500.00;

Jack Baugh, eighteen months imprisonment and a fine in the sum of $1,000.00; and

Tude Purkey, one year and one day's imprisonment and a fine in the sum of $500.00. (R. 23-25).

The cause in the trial court was styled *"The United States of America, Plaintiff,* vs. *William (Bill) Flippin, Jack Baugh and Tude Purkey, Defendants,"* the same being No. 4075 on the Criminal Docket of said court (R. 1).

The indictment was returned by the Grand Jury on the 21st day of February, 1940, the first count thereof charging petitioners, from on or about the 7th day of December, 1938, and continuously thereafter until on or about the 17th day of October, 1939, with having conspired together and with one Harry E. Mann and Tom Gilbert (who were not indicted) to violate said Act, the substance of the charges being that the petitioners, together with the said Mann and Gilbert, conspired together for the purpose of illegally importing, bringing and transporting intoxicating liquors from the State of Arkansas into the State of Oklahoma.

The indictment contained six additional counts, each charging petitioners with substantive offenses against said Act in the illegal transportation of intoxicating liquor from the State of Arkansas into the State of Oklahoma, however, petitioners were acquitted on all counts except the first count, i. e., the conspiracy charge, and hence this petition for Writ of Certiorari is limited to the conviction of petitioners on the first count of the indictment.

On March 11, 1940, petitioners filed their separate demurrers to the indictment, the same in substance alleging

that the indictment wholly failed to state facts sufficient to charge the commission of any public offense against the laws of the United States; that the court was without jurisdiction of the persons or the subject matter of the action; that the liquor laws of the State of Oklahoma were unconstitutional and invalid and that *the Liquor Enforcement Act of 1936 had no application to the importation of liquor into the State of Oklahoma* (R. 9-13).

On March 11, 1940, said demurrers were overruled by the court and exceptions taken, whereupon petitioners entered pleas of not guilty (R. 13-14).

On June 10, 1940, by permission of the court, petitioners withdrew their pleas of not guilty and, through additional counsel, filed a joint demurrer to the indictment alleging in substance, insofar as the same applied to the first count of the indictment, that the same failed to charge a violation of any valid, constitutional or subsisting law of the United States and that at the time of the alleged offense there was no valid constitutional or subsisting law in the State of Oklahoma prohibiting the *sale* of such beverages as referred to in the Federal Statute (R. 14-15).

This demurrer was overruled by the court and exceptions taken and thereupon pleas of not guilty re-entered by petitioners (R. 15-16).

On June 12, 1940, petitioners were found guilty by the jury as to the First Count of the indictment and not guilty as to the remaining six counts thereof (R. 16-18).

On June 14, 1940, petitioners filed their motion for a new trial for the reasons set forth in said motion, which was overruled by the court and exceptions taken (R. 18-23).

On July 8, 1940, petitioners Baugh and Purkey duly executed appeal bonds which were approved by the court (R. 28-30). On September 24, 1940, petitioner Flippin duly executed appeal bond, likewise approved by the court (R. 26-28).

At the close of the government's case, petitioners demurred to the evidence and moved the court to instruct the jury to return a verdict of not guilty as to each of the petitioners, which demurrer and motion, insofar as the same is applicable to the first count of the indictment, was overruled by the court and exceptions taken (R. 105-106).

At the close of all of the evidence, petitioners renewed their demurrer and their motion for a verdict of not guilty, said demurrer and motion being overruled by the court and exceptions noted (R. 115-116).

The Bill of Exceptions was duly signed by counsel for both parties and approved, settled and signed by the Hon. Harry J. Lemley, District Judge, on the 20th day of September, 1940, (R. 132), the trial judge, the Hon. Heartsill Ragon, having died in the interim.

Notice of Appeal under Rule III was duly given on the 2nd day of July, 1940, setting forth the grounds of appeal, service thereof having been accepted by counsel for the government on the 1st day of July, 1940 (R. 1-4).

Appeal from the judgment and sentence of the trial court was duly taken to the United States Circuit Court of Appeals for the Eighth Circuit, the cause there being Number 11,785, Criminal, styled "*William (Bill) Flippin, Jack Baugh, and Tude Purkey, Appellants,* vs. *United States of America, Appellee,*" which was presented by brief and oral

argument on March 17th, and 18th, 1941, and which judgment and sentence of the trial court was affirmed by the Circuit Court of Appeals on July 16, 1941 (R. 156-166).

Petition for rehearing was filed in the Circuit Court of Appeals on the 31st day of July, 1941 (R. 167-177), and the same denied by the Circuit Court of Appeals on the 28th day of August, 1941 (R. 179).

The principal matter and question involved is whether the Liquor Enforcement Act of 1936 was at the time of the alleged offense applicable to the importation of intoxicating liquors from the State of Arkansas into the State of Oklahoma.

The Federal Statute, (as hereinafter more fully set forth) made it a violation to transport intoxicating liquor into any state in which all *sales* of intoxicating liquor containing more than four per centum of alcohol by volume were prohibited. The statute further provides that the definition of intoxicating liquor contained in the laws of such state into which imported shall be applied only to the extent that *sales* of such intoxicating liquor are prohibited in such state. The laws of the State of Oklahoma define intoxicating liquor as being such that contains more than 3.2% of alcohol by *weight,* no *volumetric* measure being used in the laws of the State of Oklahoma insofar as the same pertains to *sales* thereof.

The record in this case in the trial court is devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight.

Although it is deemed that the foregoing is the important matter and question herein involved, the other

questions hereinafter set forth are seriously urged and not waived.

The specifications of error and points relied upon in the appeal from the trial court to the Circuit Court of Appeals, and herein involved are as follows:

1.

The trial court erred in overruling the demurrer to the evidence and in refusing to instruct the jury to return a verdict of not guilty in that the evidence was insufficient and the record was and is devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight.

2.

The Liquor Enforcement Act of 1936 was and is inapplicable to the transportation of liquor into the State of Oklahoma and the demurrer to the indictment should have been sustained.

3.

The trial court erred in failing and refusing to charge the jury as requested in the special requested instructions of petitioners, Nos. 2, 3, 4, 5 and 6.

4.

The trial court erred in permitting the government to interrogate its witness, Tom Gilbert, in an attempt to impeach him as to his testimony before the grand jury and the court erred in overruling the motion for a mistrial by virtue of his testimony.

5.

The judgment and sentence of the trial court was contrary to law and the admissible evidence adduced in the trial of said cause.

The Circuit Court of Appeals, from which this review is sought, in two cases, shortly prior to the consideration of

this case, wherein the transportation of intoxicating liquor into the State of Kansas (which state defines intoxicating liquor, insofar as sales are concerned, as being 3.2% of alcohol by weight, the same as in Oklahoma), held where the record in the trial court was devoid of proof as to the relative alcoholic content between a beverage containing 4% of alcohol by volume and one containing 3.2% of alcohol by weight, that the convictions should be reversed.

The Circuit Court in those cases held that it could not take judicial knowledge of the relative alcoholic content of the two beverages and that the problem presented was one of translating terms used in the Federal Statute into the terms used in the State Statute. These cases, hereinafter more fully referred to, are *Arnold* vs. *United States*, 115 Fed. (2d) 523, and *Gregg* vs. *United States*, 116 Fed. (2d) 609.

Thereafter, the same Circuit Court of Appeals, in the case of *Dolloff* vs. *United States*, 121 Fed. (2d) 157, affirmed the conviction in a similar case, but in that case there was proof in the trial court of the relative alcoholic content of a beverage containing 4% of alcohol by volume and of a beverage containing 3.2% of alcohol by weight and wherein the trial court found on the evidence introduced that the two beverages contained substantially the same alcoholic content.

We call the Court's attention to the above cases in order that it may have before it the same in the consideration of the opinion of the Circuit Court of Appeals herein.

The Circuit Court of Appeals based its affirmance of this case, as we interpret the same, substantially on the fol-

lowing grounds: (1) That since the decision of the same Circuit Court in the Arnold and Gregg cases, *supra*, the court reached the conclusion "*based upon the evidence before it*," that an alcoholic beverage containing 3.2% of alcohol by weight contained substantially 4% of alcohol by volume and that by recognized scientific authorities and the legislative history of the enactment of the Liquor Enforcement Act, the court would take judicial notice as corroborative of that *evidence*, and, therefore, that the Liquor Enforcement Act is applicable to the State of Kansas and Oklahoma; (2) that it is suggested by the court that a difference exists between the bases underlying the public policies of the States of Kansas and Oklahoma in their attitude toward intoxicating liquors and that prior to the admission of Oklahoma as a state into the union, a large part of its area was known as Indian Territory, and that by virtue thereof the federal government, in undertaking to protect the Indians, was exacting in its duty toward its wards; (3) that the Enabling Act, in connection with the admission of Oklahoma into the Union, provided that intoxicating liquor could not be sold in the state for a period of twenty-one years after the admission of the state into the Union (1907), and not thereafter until legally and constitutionally provided for; (4) that the committee reports in Congress in connection with the passage of the Act and the so called Cullen Beer Bill referred to beer, lager, ale, porter, or other similar liquors containing 3.2% of alcohol by weight as being equivalent to 4% of alcohol by volume; (5) that it is a matter of common knowledge that commercial whiskey has an alcoholic content in excess of any allowable per centum under the statute; (6) that as to the other errors

complained of, while the court finds informality in the charge of the court, the case was submitted as to preclude any misunderstanding on the part of the jury; and, (7) that the Circuit Court finds that the Liquor Enforcement Act of 1936 is applicable to the State of Oklahoma.

The Dolloff case, *supra*, was decided by the Circuit Court subsequent to the argument of this case before the court, and consequently petitioners filed their petition for rehearing herein showing the apparent distinction between that case and the case at bar, and also fully answered the opinion of the Circuit Court, all of which will be more fully treated in the supporting brief to this petition.

II.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein involves an important question of federal law as to an interpretation of an important federal statute which has not been construed by this Court, and which decision of the Circuit Court of Appeals is such as to warrant and call for an exercise of this Court's power of supervision.

2. The decision of the Circuit Court of Appeals herein involves an important question of federal procedure such as to warrant and call for an exercise of this Court's power of supervision in that in this case the record in the trial court was *devoid of proof* of an essential part of the charges in the indictment which proof the government did not make and in which the Circuit Court took upon itself the authority of making findings of fact, *de novo*, which under the law and the constitution was a burden upon the prosecution to establish in the trial court and for the jury to determine the

same. See *Edwards* vs. *United States*, 61 Sup. Ct. Rep. 669, 81 Law. Ed. 563, recently decided by this Court.

3. The decision of the Circuit Court of Appeals herein in affirming the action of the trial court in overruling the demurrer to the indictment, which indictment contained an erroneous charge of law, i. e., that the State of Oklahoma prohibited the sale of intoxicating liquor containing more than 4% of alcohol by volume, whereas the laws of the State of Oklahoma only prohibited the sales of intoxicating liquor containing an excess of alcohol of 3.2% of alcohol by weight, involves an important question of federal law and is an erroneous decision on an important question of general law in conflict with the weight of authority and probably in conflict with applicable decisions of this Court.

4. The decision of the Circuit Court of Appeals herein is directly in conflict with two prior decisions by the same Circuit Court of Appeals, i. e., *Arnold* vs. *United States*, 115 Fed. (2d) 523, and *Gregg* vs. *United States*, 116 Fed. (2d) 609, in which the situation in those cases and the instant one are practically identical and as such warrant and call for this Court's power of supervision.

5. The decision of the Circuit Court of Appeals herein involves a most important question of federal law in that in the opinion and decision of the court it bases, in part, its opinion on the fact that the State of Oklahoma occupies a position of *"pronounced difference"* between other states in that the federal government has had and has many Indian wards in said State of Oklahoma and in various acts of legislation has been exacting *"in the maintenance of its duty and undertaking to protect its Indian wards."*

6. The decision of the Circuit Court of Appeals herein involves an important question of federal procedure in that in its decision and opinion, the court states *"based upon evidence before it"* that it has reached the conclusion that an alcoholic beverage containing 3.2% of alcohol by weight contains substantially 4% of alcohol by volume, whereas the record in the trial court was and is *devoid of proof and there was no evidence* as to the relative alcoholic content of beverages, one measured by *weight* and the other by *volume.*

7. While there is no conflict between the various Circuit Courts of Appeal, there is a conflict between the various District Courts, in addition to the conflict in the same Circuit Court of Appeals. See *United States* vs. *Robason,* (D.C. Kan.) 38 Fed. Supp. 991, where it was held that the Liquor Enforcement Act of 1936 applied to the State of Kansas (our view being that insofar as here applicable, the laws of Kansas and Oklahoma are substantially the same) but the court in that case stated as follows:

> "It is interesting to note that in the neighboring state of Missouri the District Judges are not in agreement concerning the Kansas law.
>
> "In United States vs. 1940 Model Dodge Coupe, Motor No. D14-191545, No. 674, Judge Merrill E. Otis was of the opinion that the Kansas statute was insufficient.
>
> "On the other hand, Judge Albert Reeves on January 14, 1941, in United States vs. Arnold, D. C., 38 F. Supp. 863, was of the opinion the Kansas law qualified Kansas for protection under the Twenty-First Amendment and the Liquor Enforcement Act of 1936."

(The last above mentioned case, i. e., *United States* vs. *Arnold,* was reversed by the Circuit Court of Appeals from which a review is sought herein, holding

that the Liquor Enforcement Act of 1936 was inapplicable to the State of Kansas.)

8. If the basis of the Circuit Court's affirmance of the petitioners' convictions is that its examination of the Congressional Report convinced it that Congress intended the Liquor Enforcement Act of 1936 to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2% of alcohol by weight and that therefore, the act would be construed to apply to the State of Oklahoma, then the Circuit Court decided a Federal question in a way probably in conflict with applicable decisions of this Court because the act is not ambiguous as to its definition of the states affected by it and under such circumstances, the fact that Congress may have intended something else as shown by Congressional Reports and debates and other data cannot be considered. *Merritt* vs. *Welsh*, 104 U. S. 694, 702-703; *Hamilton* vs. *Rathbone*, 175 U. S. 414, 419; *Thompson* vs. *United States*, 246 U. S. 547, 550.

9. The decision of the Circuit Court of Appeals herein in making its independent investigation and finding of the relative alcoholic content of beverages containing "3.2% of alcohol by weight" and "4% of alcohol by volume," where the record in the trial court was devoid of proof, is one involving an important federal question in a way probably in conflict with applicable decisions of this Court and, further, such that it has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. While courts may take judicial knowledge of certain well known established facts, such action and decision of the court in taking judicial

knowledge of the relative alcoholic contents of all of the various kinds of beverages charged in the indictment as being imported goes beyond the requirement of the law imposed upon the courts to exercise this power with caution, and as such the decision of the Circuit Court of Appeals herein is a conclusion different than would be justified where, as here, there was no evidence whatsoever in the trial court upon the subject.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Eighth Circuit had in this case, numbered and entitled on its docket as No. 11,785, Criminal, "*William (Bill) Flippin, Jack Baugh, and Tude Purkey, Appellants,* vs. *United States of America, Appellee,*" to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the United States Circuit Court of Appeals for the Eighth Circuit and that of the United States District Court for the Western District of Arkansas be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated, this 22 day of September, A. D. 1941.

J. FORREST MCCUTCHEON,
1023 Texas Bank Building,
Dallas, Texas,
Attorney for Petitioners.

Certificate of Counsel

I, the undersigned, J. Forrest McCutcheon, Attorney for Petitioners herein, a Member of the Bar of the Supreme Court of the United States, hereby certify that I have carefully examined the record herein and in the light of its contents consider this Petition for Writ of Certiorari well founded, and that it is not interposed for the purpose of delay.

J. Forrest McCutcheon,
Attorney for Petitioners.

Supreme Court of the United States

October Term, 1941

No. ------

WILLIAM (BILL) FLIPPIN, JACK BAUGH AND TUDE PURKEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was rendered on the 16th day of July, 1941, and is set forth in the record at pages 157-166, and is reported in 121 Fed. (2d) 742.

II.

Jurisdiction.

(1) The judgment of the Circuit Court of Appeals for the Eighth Circuit, sought to be reviewed herein, is dated and was entered on the 16th day of July, 1941, affirming the judgment and conviction of petitioners as to the first count of the indictment in the United States District Court within and for the Western District of Arkansas (R. 166).

Petition for re-hearing was duly filed on the 31st day of July, 1941 (R. 167-177), and on the 28th day of August, 1941, the Circuit Court of Appeals denied said petition for re-hearing and granted a stay of the mandate herein as in the order provided (R. 179).

(2) The statutory provisions which sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, (28 U. S. C. A. 347). The petition herein for writ of certiorari is filed within the time provided for in the Rules of Practice and Procedure in Criminal Cases promulgated by the Supreme Court of the United States on May 7, 1934.

(3) The cases which it is believed sustain said jurisdiction, among others, are as follows:

Edwards vs. *United States*, 61 Sup. Ct. Rep. 669, 81 Law Ed. 563;

United States vs. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 Law Ed. 1007;

Duplex Printing Press Co. vs. *Deering*, 254 U. S. 443, 65 Law Ed. 349;

Walker vs. *Johnston*, 312 U. S. —, 61 Sup. Ct. 574, 85 Law Ed. —;

Whitney vs. *Dick*, 202 U. S. 132;

Counselman vs. *Hitchcock*, 142 U. S. 562;

Boyd vs. *United States*, 116 U. S. 616.

(4) The nature of the case and the judgment and sentence of the trial court and the decision of the Circuit Court were such as to bring this case within the jurisdictional provisions relied upon in that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court wherein the latter overruled petitioners' demurrer to the indictment for the reasons hereinabove set forth and

likewise erred in overruling petitioners' demurrer to the evidence and motion for an instructed verdict of "not guilty" for the reason that the prosecution wholly failed to establish in the trial of the case that a beverage containing 4% of alcohol by volume is the same as one containing 3.2% by weight, the Liquor Enforcement Act of 1936 providing that the definition of intoxicating liquors into which state imported is governed by the statutes of such state insofar as applicable to *sales* thereof, and in the State of Oklahoma the same is found to be 3.2% of alcohol by weight whereas the Federal Statutes only refers to liquors containing alcohol in excess of 4% by volume.

(5) The record reflects that the indictment alleges that in the State of Oklahoma at the time of the alleged offense the laws of the State of Oklahoma prohibited the sale of beverages containing an alcoholic content in excess of 4% by volume, whereas, as will be hereinafter shown, at the time of the alleged offense, the laws of the State of Oklahoma provided that the sale of beverages containing an alcoholic content in excess of 3.2% by weight was prohibited and that such allegations in the indictment were and are erroneous charges of the law.

(6) The record further reflects that during the trial of the case (R. 97, et seq.), the government, over the objection of petitioners interrogated one of its witnesses as to his testimony before the grand jury, which petitioners respectfully say was improper, erroneous and an attempt upon the part of the prosecution to unduly inflame the minds of the jury against petitioners.

(7) That all of the foregoing was violative of the legal and constitutional rights of petitioners, contrary to law and

was an erroneous decision involving an important question of federal law that should be decided by this Court and was such a departure from the accepted and usual course of judicial proceedings and such an erroneous action and decision in conflict with federal procedure and the laws of the United States and with the applicable decisions of this Court as to bring this case within the judicial provisions relied upon.

III.

Statement of the Case.

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this Brief, the same as if here repeated again in full.

IV.

Specifications of Errors.

(1) The Circuit Court of Appeals erred in affirming the judgment of the trial court in overruling petitioners' demurrer to the evidence and motion for an instructed verdict of "not guilty" where the record was devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight and in departing from the record and making a finding of fact de novo not in the record which finding could not be properly considered a matter of judicial knowledge.

(2) The Circuit Court of Appeals erred in affirming the judgment of the trial court in that the demurrer to the indictment should have been sustained by the trial court, the allegations in the indictment as to the law of the State of Oklahoma at the time of the alleged

offense as to the sale of intoxicating liquors not being the law of Oklahoma as charged.

(3) The law of the State of Oklahoma does not provide a permit system bringing the transportation of intoxicating liquors into said state under the terms and provisions of the Liquor Enforcement Act of 1936.

(4) The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein the trial court refused petitioners' special requested instructions Nos. 2, 3, 4, 5, and 6, for the reason that said requested instructions were applicable to the case and should have been given to the jury by the trial court.

(5) The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein the latter court permitted the prosecution to interrogate its witness, Tom Gilbert, as to his testimony before the grand jury in this same case.

(6) The Circuit Court of Appeals erred in affirming the judgment of the trial court in that the charge of the trial court to the jury was and is an erroneous charge of the law applicable to this case.

V.

ARGUMENT

Point A

(Specification of Error No. 1)

The Circuit Court of Appeals erred in affirming the judgment of the trial court in overruling petitioners' demurrer to the evidence and motion for an instructed verdict of "not guilty" where the record was devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight and in departing from the record and making a finding of fact de novo not in the record which finding could not be properly considered a matter of judicial knowledge.

STATEMENT

As above stated, petitioners were convicted of the offense of having conspired together and with others to violate the Liquor Enforcement Act of 1936 in the transportation of liquors from the State of Arkansas into the State of Oklahoma.

The record in the trial court was devoid of proof as to the alcoholic content of the beverages transported and there is no proof whatsoever in the record by expert testimony, or otherwise as to the relative alcoholic content of a beverage containing 4% of alcohol by volume, as referred to by the Federal Statute, and a beverage containing 3.2% of alcohol by weight, as referred to by the laws of the State of Oklahoma, into which State the beverages were alleged to have been transported. The latter was and is the only definition of intoxicating liquor under the laws of Oklahoma as the same refers to sales which is the criterion established in the Federal Statute, as more fully hereinafter shown.

At the close of the government's case and at the close of all of the evidence, petitioners demurred to the evidence and moved the trial court for an instructed verdict of "not guilty" (R. 106 and 116). The same were overruled by the trial court and exceptions taken to the rulings of the trial court.

AUTHORITIES AND STATUTES

Arnold vs. *United States of America,* (8th C.C.A.) 115 Fed. (2d) 523;

Gregg vs. *United States of America,* (8th C.C.A.) 116 Fed. (2d) 609;

Edwards vs. *United States,* 61 Sup. Ct. Rep. 669;

Dolloff vs. *United States,* 121 F. (2d) 157;

Liquor Enforcement Act of 1936, (27 U.S.C.A. 223);

G. S. of Kansas 1935, 21-2101;

G. S. of Kansas, 1939 Supp., 21-2109;

Sec. 2607-a O. S. 1931, H.S.L. 1933, Sec. 8, O.S.L. 1933, Ch. 153, Sec. 1;

Sec. 2618 O. S. 1931, H.S.L. 1933, Sec. 9, O.S.L. 1933, Ch. 153, Sec. 2;

Oklahoma Liquor Permit Law of 1939, Ch. 16, O.S.L. 1939 p. 16.

ARGUMENT

As stated *supra,* petitioners were only convicted of the offense charged in the First Count of the Indictment, i. e., conspiracy to violate the Liquor Enforcement Act of 1936 (27 U.S.C.A. 223) in the importation, bringing and transportation of intoxicating liquors from on or about the 7th day of December, 1938, and continuously thereafter until on or about the 17th day of October, 1939, from the State of

Arkansas into the State of Oklahoma. Petitioners were acquitted on the substantive offenses charged in the remaining counts of the indictment.

We believe that it is elementary and unnecessary to burden the Court with authorities on the proposition of law that in order to be guilty of conspiracy to commit an offense against the United States, as provided for in Sec. 88, Title 18 U.S.C.A., the offense must be a valid, constitutional, and subsisting law and that if the Statute which the accused are charged with conspiring to violate is not a valid law, then, of course, there can be no violation as charged in the First Count of the Indictment herein. By the same token, we say likewise that if the prosecution failed to prove beyond a reasonable doubt that the Liquor Enforcement Act of 1936, though valid and constitutional, did not apply to the transportation of liquor into the State of Oklahoma, then too the conspiracy charge must fall.

We submit that the Liquor Enforcement Act of 1936 was inapplicable to transportation of liquor into the State of Oklahoma insofar as the record herein is concerned, and that inasmuch as the Government wholly failed to establish by legal and competent evidence that 4% of alcohol by volume in a beverage is the same as 3.2% of alcohol by weight in a beverage, the conspiracy charge was not maintained.

The Liquor Enforcement Act of 1936 (27 U.S.C.A. 223) which, insofar as here material, provides as follows:

> "(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are pro-

hibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000.00 or imprisoned not more than one year, or both."

The statute, in sub-division (b) thereof, further provides, in determining whether one is acting in violation thereof that, "The definition of intoxicating liquor contained in the laws of such State shall be applied, but *only to the extent that sales* of such intoxicating liquor * * * are prohibited in such State."

The same Circuit Court of Appeals from which a review is sought herein, in the Arnold and Gregg cases, cited *supra,* held that where the charge was that of the transportation of liquor the charge was that of the transportation of liquor from a "wet" state into the State of Kansas, and where the definition of intoxicating liquor in the State of Kansas, insofar as the same applied to *sales* thereof, was 3.2% of alcohol by weight, and where the record was devoid of proof as to the relative alcoholic content of a liquor or beverage in which alcohol constitutes 4% by volume and a liquor or beverage in which alcohol constitutes 3.2% by weight, that the demurrer and motion for acquittal should have been sustained.

In the Arnold case, the appellate court stated as follows, to-wit:

"The Federal statute upon which the indictment is based prohibits the transportation of liquor into any state in which all sales (with exceptions not here material) of intoxicating liquor containing more than 4 per cent of alcohol by volume are prohibited. On the other hand, the Kansas statute defining intoxicating liquor includes such liquor as contains more than 3.2 per cent of alcohol *by weight*. The record is devoid of proof as to the relative alcoholic content of a liquor or beverage in which alcohol constitutes 4 per cent by volume and a liquor or beverage in which alcohol constitutes 3.2 per cent by weight. What the fact may be in this regard is not of such common knowledge that the court may know it judicially. United States v. Miller, 307 U. S. 174; Wm. A. Smith Const. Co. v. Brumley, 10 Cir., 88 F. (2d) 803. Whether the laws of Kansas prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume depends upon whether 3.2 per cent by weight is the same or less than 4 per cent by volume. This presents a problem of translating terms used in one statute into terms used in another statute. We are cited to no recognized standards, table or formulae, by aid of which such translation of terms may be effected. We can not presume that it is impossible to have an alcoholic beverage containing not more than 3.2 per cent of alcohol by weight, which contains more than 4 per cent of alcohol by volume, and hence, we can not say that the Federal Act applies to the State of Kansas. The statute is applicable only where the state has adopted a control method coming within that outlined by the Federal statute. Dunn v. United States, 10 Cir., 98 F. (2d) 119. The conviction on the indictment is therefore reversed."

The same court, in the Gregg case, on petition for rehearing, followed the decision and opinion of the court in the Arnold case.

It occurs to us, therefore, that the only question is whether the Oklahoma laws defining intoxicating liquor with reference to the *sales* thereof is the same, or practically the same, as that of the laws of the State of Kansas. We submit that an answer in the affirmative will dispose of the petition herein, requiring reversal.

The Kansas Law prohibiting the sale of intoxicating liquor (G. S. of Kansas 1935, 21-2101) provides:

> "It shall be unlawful for any person to directly or indirectly manufacture, sell, barter, or give away, furnish or keep or have in his possession for personal use or otherwise any spiritous, malt, vinous, fermented or other intoxicating liquors, or permit another to have or keep or use any such liquors on any premises owned or controlled by him, except druggists or registered pharmacists, as hereinafter provided. * * *"

The Kansas Law (G. S. of Kansas 1939 Supp. 21-2109) defines intoxicating liquor as follows:

> "The term spiritous, malt, vinous, fermented or other intoxicating liquors as used in sections 21-2101 to 21-2108, inclusive, of the General Statutes 1935, and all amendments thereto, are hereby defined to include all beverages which contain more than three and two-tenths per cent (3.2%) of alcohol by weight and all such beverages are hereby declared to be intoxicating liquors under the laws of this state."

Now, let us compare the Oklahoma law with that of the Kansas law.

The Oklahoma Statute (Sec. 2607-a O. S. 1931, H.S.L. 1933, Sec. 8, O.S.L. 1933, Ch. 153, Sec. 1, effective April 20, 1933) defines intoxicating liquors as follows:

> "Beverages containing more than three and two-tenths (3.2%) per cent alcohol by weight are hereby de-

clared to be intoxicating; all other beverages are declared to be non-intoxicating."

The Statute goes further with reference to beverages containing more than one-half of 1% alcohol by volume, but a reading of the entire law reflects that the same refers to the manufacture and sale of such beverages only as coming under the rules and regulations of the State, and it is readily to be seen that the same refers to beer.

The Oklahoma Statute (Sec. 2618 O. S. 1931, H.S.L. 1933, Sec. 9, O.S.L. 1933, Ch. 153, Sec. 2, effective April 20, 1933) provided, insofar as applicable here, as follows:

> "It shall be unlawful * * * to manufacture, *sell*, barter, give away or otherwise furnish any liquors * * * which contain more than three and two-tenths (3.2%) per cent of alcohol, measured by weight. * * *"

All the laws of Kansas define intoxicating liquor as 3.2% of alcohol by weight and prohibit *sales* of beverages containing alcohol in excess thereof. The law of the State of Oklahoma likewise, and exactly the same, defines intoxicating liquor as that containing an excess of 3.2% of alcohol by weight and like the Kansas Statute prohibits *sales* of beverages containing more than 3.2% of alcohol by weight. No reference is made in either statute to beverages, insofar as *sales* are concerned, of an alcoholic content in excess of 4% by *volume*.

Anticipating that it may be urged that the Statutes of Oklahoma were amended so as to bring the transportation of liquor into Oklahoma under the Liquor Enforcement Act of 1936, we call attention to the applicable portion of the following quoted Oklahoma Liquor Permit Law of 1939 (Ch. 16, O.S.L. 1939, p. 16) wherein it is provided, as follows:

"It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four (4%) percent of alcohol by volume, without a permit first secured therefor as hereinafter provided."

The Federal Statute expressly provides, as stated *supra:*

"The definition of intoxicating liquor contained in the laws of such state shall be applied, *but only to the extent that sales of such intoxicating liquor * * * are prohibited in such state.*"

This is an express limitation written into the Federal Statute. Nothing therein changes the 3.2% by weight definition. It is clear, unequivocal and direct to the point. The Oklahoma Legislature in passing the 1939 permit law could easily have amended the earlier law with reference to the *sale* of intoxicating liquor and could easily have prohibited the *sale* of beverages with an alcoholic content in excess of 4% of alcohol by volume. The Legislature of the State of Oklahoma did not see fit so to do. The definition of intoxicating liquor in the State of Oklahoma, insofar as the same is applicable to *sales,* which is the only criterion that can be used with reference to the Federal Statute involved here, reads 3.2% by weight and there is no reference to the State laws to the alcoholic content by volume.

The Circuit Court of Appeals, in its opinion, as we interpret the same, takes the view that since the determination of the Arnold and Gregg cases, it has come to the conclusion that it may take judicial notice that a beverage containing 3.2% of alcohol by weight will contain substantially 4% of alcohol by volume and makes, what we consider, an inde-

pendent finding that the two measurements are substantially the same.

We can not agree, taking into consideration the various kinds of beverages in question that the Circuit Court was within its rights in judicially knowing that the relative measurements are the same. The record was devoid of proof as to the relative alcoholic content and petitioners were not afforded the right of cross examination of witnesses in connection with this question of fact, and we respectfully say that to take away from the jury that question of a scientific matter and substituting therefor, de novo, the independent finding of the appellate court, deprived petitioners of their legal and constitutional rights and of their right of trial by jury and that as such the same is not due procedural process of law.

The Supreme Court of the United States in the recent case of *Edwards* vs. *United States,* 61 Sup. Ct. Rep. 669, through Mr. Justice Reed, in passing on the right of the accused of cross examination and on the question of proper procedure with reference to the introduction in evidence of records for the first time in the appellate court, stated as follows, at page 674:

> "Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. *In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a*

part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX, 18 U.S.C.A. Sec. 688.

"The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. *But procedure is the skeleton which forms and supports the whole structure of a case.* The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. *The requirement that allegations must be supported by evidence tested by cross examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.*" Cf. 28 U.S.C.A. 661 and Walker vs. Johnston, 312 U. S. —, 85 Law Ed. —. (Italics ours.)

We respectfully submit, therefore, that the situation at hand is very much the same as in the Edwards case, which was decided by the Supreme Court after the brief was written in the appellate court and just prior to oral argument therein, and that the Arnold and Gregg cases are sound law and should be followed herein.

The Court, in its opinion, cites the recent case of *Dolloff* v. *United States,* 121 Fed. (2d) 157, decided by it on July 8, 1941, and concurs in the conclusion referred to therein but it must be noted that the court in its opinion in the Dolloff case specifically points out that there *the record is not devoid of proof* as to the relative alcoholic contents of a liquor in which alcohol constitutes 4% by volume and a liquor in

which alcohol constitutes 3.2% by weight, and the opinion further states that testimony on this question was presented in the lower court and from the testimony so presented, the trial court found in effect that an alcoholic beverage containing 3.2% of alcohol by weight will contain approximately 4% of alcohol by volume. The Circuit Court further states in the Dolloff case that this finding *was sustained by substantial testimony.*

In this case the record is devoid of proof of the relative volumetric and weight alcoholic contents.

The Circuit Court further says in the Dolloff opinion that in this condition of the record (we interpret that as referring to the fact that there was testimony in the lower court as to the relative alcoholic contents), it can not now conclude as it did in the Arnold case that the State of Kansas has not adopted a control method coming within that outlined by the Liquor Enforcement Act of 1936.

We may be in error in our interpretation of the opinion in the Dolloff case, but we read the same to say that the two cases are distinguishable because in the Arnold case there was no proof of the relative alcoholic contents and no recognized formulae or standards called to the court's attention; whereas, in the Dolloff case, the record shows *that there was testimony in the lower court to substantiate the finding of the court as to the relative alcoholic contents in question.* The opinion of the court in the Dolloff case, therefore does not violate the rule laid down by the Supreme Court of the United States in the Edwards case, cited *supra*, but we respectfully submit that the opinion of the Circuit Court in the instant case is contrary to the holding of the Supreme Court in the Edwards case.

The Circuit Court in its opinion cites *Hayes* vs. *United States,* 112 Fed. (2d) 417, and *Hinkle* vs. *United States,* 115 Fed. (2d) 217, both decided by the Circuit Court of Appeals for the Tenth Circuit, which were affirmed, the Circuit Court herein in its opinion stating *that in neither of said cases was the question of the per centum of alcoholic content even suggested.* In the Gregg case is it not true that the same situation existed when the court wrote its original opinion, and when it denied the first petition for rehearing? But, when the second petition for rehearing was filed in the Gregg case and the matter called to the court's attention of the question having been raised in the Arnold case, then what was the action of the court in the Gregg case? *When the per centum of alcohol question was called to the court's attention in the Gregg case, the second petition for rehearing was granted and the case reversed.* Can we then say what the Tenth Circuit Court would have done in the Hayes and Hinkle cases had this matter been called to the court's attention? We see, therefore, nothing controlling here from the Hayes and Hinkle cases.

The court in its opinion herein points out that the situation in Oklahoma is peculiar in that at the time of its admission as a state, it was known as Indian Territory and that there were a great number of wards of the Government residing there, and that since the use of intoxicating liquors was especially injurious to Indians, the Government was very exacting in passing legislation curbing the liquor traffic in the state.

Attention is directed to the fact that the Enabling Act (Vol. 34 U. S. Stat., Chap. 3335, p. 267, *et seq.)* only pro-

vided for the prohibition for a period of twenty-one years from the date of the admission of the state into the Union and thereafter until the people of the state shall otherwise legally and constitutionally legalize the liquor traffic. The State of Oklahoma was admitted to the Union in 1907 and the twenty-one year period terminated, therefore, in 1928. At that time as at the time of the offense charged herein, the Indian population in Oklahoma was entirely different from that at the time of the infancy of Oklahoma's statehood. The white infiltration into the State has been tremendous; the Indian population has decreased and they have come more to the ways of the white man in their mode of living; there has been a great deal of inter-marriages between the white and the red man, and, as a matter of fact, there have been two recent public votes held in the State of Oklahoma for the legalizing of liquor. Neither passed, however, there was a large vote in favor of the legislation, showing the change in the minds of the people of Oklahoma concerning this question.

Now, as to the Federal Government being so greatly concerned as to its wards in the State of Oklahoma, why did not Congress pass a special act with reference to Oklahoma in connection with the Liquor Enforcement Act of 1936? Congress was simply content, in that statute, in its definition of intoxicating liquors, to provide:

> "The definition of intoxicating liquor contained in the laws of such state" (where transported) "shall be applied only to the extent that sales of such intoxicating liquor * * * prohibited in such state."

Congress is bound to have known of the Indian situation in Oklahoma and is bound to have known of the then existing

laws in Oklahoma with reference to liquor control as was later discussed in the case of *Dunn* vs. *United States*, 98 Fed. (2d) 119, by the Circuit Court of Appeals for the Tenth Circuit, within whose jurisdiction Oklahoma is situated. It would have been a very simple matter indeed for Congress, in enacting the Liquor Enforcement Act of 1936, to have made provisions for the zealous safeguarding of the red men of Oklahoma, but it seems to us that it is apparent that the change in the population of the State of Oklahoma has taken it out of the class and category in which it was in the territorial days and at the time of the admission of the State into the Union.

Reference is made to excerpts from Congressional Committee Reports wherein certain statements are made indicating that liquor containing 3.2% of alcohol by weight is equivalent to 4% by volume. We submit that the fact that some member of the Committee, or for that matter, the Committee in its entirety, made such a report, it does not necessarily follow that such opinion of the Committeemen is true and correct. The fact that a committeeman reports that in his opinion black is white does not necessarily make it so.

It may be true that plain water mixed with pure ethyl alcohol, wherein the water contains 3.2% of alcohol by weight, will be more or less equivalent to 4% by volume, but the fact can not be overlooked, and we respectfully submit that it can be established by competent expert testimony, that where solids come into the picture, that is beverages such as vine, containing heavy solids, beer, with its heavy malt content, whiskey with its grain content, etc., then there will be substantial difference in alcoholic content between the two measurements.

We appreciate the fact that where there is an ambiguity in a statute involved, it is proper to look to committee reports for the purpose of ascertaining the intent of the law, but where the law is clear and not ambiguous and specifically makes a provision as in the Liquor Enforcement Act that the definition of intoxicating liquor shall be applied only to the extent that *sales* of such liquor are prohibited in the state into which imported, then it is respectfully submitted that judicial interpretation of the law should be made as the statute is written. It is evident that the Congress meant just exactly what it said. The language is clear. It is concise and direct to the point. There is no ambiguity in the language of the statute.

When the Oklahoma Legislature enacted the Conformity Act, (Ch. 16, O.S.L. 1939, p. 16) it no doubt had before it the Liquor Enforcement Act of 1936. Why, then, did not the Legislature of Oklahoma include in the Conformity Act the 4% volumetric measure instead of the 3.2% weight measure? The Federal Liquor Enforcement Act is clear on that point and in the absence of the inclusion of the volumetric measure in the Conformity Act, we say that the Liquor Enforcement Act of 1936 is inapplicable to the State of Oklahoma and that the Conformity Act is really in effect a *"non-conformity"* statute.

It is evident, therefore, that the question involved is one involving an important question of Federal Law and involving the interpretation of a Federal Statute affecting wards of the federal government, which statute has not been passed upon by this Court and with reference to which we respectfully say that the decision of the Circuit Court of

Appeals herein is in conflict with the great weight of authority and with the applicable decisions of this Court as to the procedural question involved and that as such the same calls for the exercise of this Court's power of supervision for writ of certiorari.

Point B

(Specification of Error Nos. 2 & 3)

The Liquor Enforcement Act of 1936 was and is inapplicable to the transportation of liquor into the State of Oklahoma and the demurrer of petitioners to the indictment should have been sustained.

STATEMENT

The first count of the indictment alleged, among other things, a conspiracy on the part of petitioners to transport intoxicating liquor from the State of Arkansas into the State of Oklahoma and the indictment further alleged:

> "During the existence of said conspiracy all sales (in the State of Oklahoma) * * * of intoxicating liquor containing more than 4 per centum of alcohol by volume was prohibited." (R. 6)

As set forth in the Statement of the Case, *supra*, petitioners jointly and severally demurred to the indictment (R 9-15) which demurrer was overruled by the court and exceptions taken.

AUTHORITIES AND STATUTES

Dunn vs. *United States*, 98 F. (2d) 119;

De Hasque vs. *A. T. & S. F. Ry. Co.*, 60 Okl. 183, 173 P. 72;

Smythe vs. *State*, 2 Okl. Cr. 286, 101 P. 611;

Baldridge vs. *State*, 80 Okl. 85, 194 P. 217;

Crossland vs. *State*, 74 Okl. 58, 176 P. 944;
House Bill No. 264, Oklahoma Legislature 1939;
Oklahoma Laws, 1907-08 P. 603;
Oklahoma Laws 1910-11 P. 154;
Sec. 3605, Oklahoma Revised Laws 1910;
Sec. 7002 Compiled Statutes of Oklahoma 1921;
Sec. 2618 Oklahoma Statutes 1931;
37 Okla. St. Ann. 1;
37 Okla. St. Ann. 38.

ARGUMENT

(a) *The indictment failed to properly state the law of the State of Oklahoma.*

The First Count of the Indictment alleged that at the time of the alleged conspiracy the State of Oklahoma prohibited the sale of liquor in excess of 4% of alcohol by volume. Such was and is not the law of the State of Oklahoma and was an erroneous charge in the indictment. As has been set forth, *supra*, at the time of the commission of the alleged offense herein, the definition of intoxicating liquor in the State of Oklahoma, insofar as the same pertained to *sales* was not 4% of alcohol by volume but was 3.2% of alcohol by *weight*.

For this reason, we respectfully submit that the demurrer to the indictment should have been sustained and appellants discharged thereunder.

(b) *The laws of Oklahoma do not provide a permit system bringing the transportation of intoxicating liquor into said state under the terms and provisions of the Liquor Enforcement Act of 1936.*

The provisions of the Liquor Enforcement Act of 1936 apply: (1) If such liquor is not accompanied by permits • • • as required by the laws of such state, or (2) If all importation, bringing or transportation of intoxicating liquor into such state is prohibited by the laws thereof.

The Federal Statute does not apply if the laws of the state into which such importation was made do not require a permit to accompany the liquor imported or transported thereinto or if the laws of such state do not prohibit *all* importation of intoxicating liquor into such state.

While we feel that a disposition of our First Proposition herein will dispose of this case, nevertheless, we present this argument as an additional reason why the judgment and sentence of the trial court herein should be reversed and why the decision of the Circuit Court of Appeals should be reviewed.

As was pointed out by the court in the Tenth Circuit Court of Appeals in its decision in *Dunn* v. *United States*, 98 F. (2d) 119, the laws of Oklahoma, at the time of rendering that decision, did not prohibit all importation of intoxicating liquor into its territory. That court further declared that the law of Oklahoma "does not provide for a permit or licensing system with respect to intoxicating liquor imported or transported into the state." Because of these facts that court, in the *Dunn* case, held the Act of Congress inapplicable and reversed the cause with instructions to dismiss.

Admittedly House Bill No. 264, Oklahoma Legislature 1939, was enacted in an attempt to bring Oklahoma within the provisions of the Act of Congress. To succeed, that law

must either *(1)* prohibit *all* importation of intoxicating liquor *or (2)* require a permit to be first procured to accompany the transportation into the state of intoxicating liquor. It is to be remembered that the wording of the Act of Congress in the latter instance is "if such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter *required by the laws of such state.*"

We submit that House Bill No. 264 does not bring the State of Oklahoma under the provisions of the Act of Congress because *(first)* it does not by its terms prohibit *all* importation, bringing or transportation of intoxicating liquor into such state, and *(second)* it does not by its terms *require* a permit for intoxicating liquor except sacramental wine and industrial or medicinal alcohol.

Section 1 of House Bill No. 264 reads as follows:

> "It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this state, containing more than four (4%) per cent of alcohol by volume, *without a permit first secured therefor as hereinafter provided.*" (Italics our own.)

Clearly, this section does not attempt to prohibit *all* importation of intoxicating liquor into the State of Oklahoma, and does not bring Oklahoma under the second "if" in the Enforcement Act, because the importation is prohibited when "without a permit first secured therefor as hereinafter provided."

Therefore, the question is: Does House Bill No. 264 bring the State of Oklahoma under the first "if" in the

Enforcement Act, reading, "If such liquor is not accompanied by such permit * * * (as is) required by the laws of such state"?

Section 2 of the House Bill 264, reads as follows:

"Permits may be issued, as in this act provided, for such importation and transportation of alcohol for scientific or mechanical purposes by and to such scientific institutions, universities and colleges as are authorized to secure the same free of tax under the laws of the United States, and alcohol by and to hospitals and sanitariums for medicinal use in such hospitals and sanitariums, and for the importation and transportation of alcohol to and by any apothecary, druggist, pharmacist or manufacturing agency, who shall need same for such purpose and, who shall have executed a bond to the State of Oklahoma, approved by the Tax Commission of the State of Oklahoma, in the sum of not less than One Thousand ($1,000.00) Dollars, conditioned that, none of said alcohol shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, or in such manufacturing business, the sale of which prescriptions, medicines, or manufactured products would not subject him or it to the payment of the special tax required of liquor dealers by the United States. Permits may also be issued for the importation and transportation, or causing to be imported or transported into this state, of wine for sacramental purposes. *No permit shall be issued to any person, or for any purpose, or for the importation of any intoxicating liquor, except as specifically authorized under this section.*" (Italics our own.)

Section 3 of the act makes provision for the permit to accompany all shipments. Sections 4 and 5 provide for the form of application. Section 6 provides the penalty. Sec-

tion 7 fixes the fees charged for permits. Section 8 provides for partial invalidity. Section 9 repeals sections 2597 and 2598, Oklahoma Statutes 1931. Section 10 provides that the laws applicable to search warrants shall not be affected by the act.

House Bill No. 264, therefore, provides a penalty for importing intoxicating liquor into Oklahoma *when unaccompanied by a permit;* provides for the issuance of permits to accompany importations of industrial and medicinal alcohol and sacramental wine, and forbids the issuance of permits to any person for any purpose except for industrial and medicinal alcohol and sacramental wine.

The Act of Congress, to be effective, requires that the transportation be not accompanied by the permit *required* by the laws of the state. The Oklahoma act only *requires* a permit for alcohol and wine, and *forbids* a permit for any other type of intoxicating liquor. If such law *prohibits* the issuance of a permit to accompany intoxicating liquor (except alcohol and wine) can it be argued that such law *requires* a permit to accompany intoxicating liquor (except alcohol and wine)? We think not. We believe that, to bring Oklahoma under the provisions of the Act of Congress, one of the acts will have to be amended, as follows:

1. Amend the Act of Congress by changing the wording of the second "if" to read "if the importation, bringing or transportation of *such* intoxicating liquor into such state is prohibited by the laws thereof"; or,

2. Add a third "if" reading "if (3) such liquor so transported is liquor for which the issuance of a permit is prohibited by the laws of such state"; or,

3. Amend House Bill No. 264 to make Oklahoma an embargo state, prohibiting the importation of all intoxicating liquor absolutely; or,

4. Amend House Bill No. 264 so as to provide for the issuance of a required permit before any intoxicating liquor may be imported.

As House Bill No. 264 now stands it prohibits the importation of intoxicating liquor, "as defined by the laws of this state * * * without a permit first secured therefor as hereinafter provided." It "provides" for permits for industrial and medicinal alcohol and sacramental wine only, and forbids permits for any other intoxicating liquor. It does not "require" a permit for any other intoxicating liquor than alcohol and sacramental wine. Therefore, we argue that the importation of beer, whiskey, gin, etc., into Oklahoma, unaccompanied by a "permit," is not a violation of the Liquor Enforcement Act of 1936 because a permit for such types of intoxicating liquors is not "required" by the law.

We feel constrained to call this Court's attention to an anomalous situation presented by the provisions of House Bill No. 264. In the first place, its clear purpose is to deal with the importation of "any intoxicating liquor, as defined by the laws of this state," without a permit therefor as therein provided for. In its next section it requires a permit to accompany the importation of sacramental wine, which is not "intoxicating liquor, as defined by the laws of this state." The act itself does not attempt to declare sacramental wine to be intoxicating liquor, and there is no other law of the State of Oklahoma declaring sacramental wine

to be intoxicating liquor. "The laws of this state" are the enactments of the legislature and the decisions of the courts construing such enactments. In the case of *De Hasque* v. *A. T. & S. F. Ry. Co.*, 60 Okl. 183, 173 Pac. 72, L.R.A. 1918-F, 259, the Supreme Court of the State of Oklahoma held:

> "The provisions of section 46, article 25, of the Constitution, prohibiting the sale and transportation of intoxicating liquors, do not apply to altar wine to be used solely for sacramental purposes in divine worship, although such wine be capable of use as a beverage, and, if drunk in sufficient quantities, will produce intoxication."

That decision, rendered in 1918, announced the fixed policy of the State of Oklahoma ever since the adoption of its Constitution in 1907 and the enactment of its first prohibition statute in 1907-1908. All legislative enactments since statehood expressly except sacramental wines from the provisions of liquor statutes, except House Bill No. 264, and it, in its first section, limits its provisions to intoxicating liquor as defined by the laws of the state. See:

Laws 1907-08, page 603;
Laws 1910-11, page 154;
Section 3605, Revised Laws 1910;
Section 7002, Compiled Statutes 1921;
Section 2618, Oklahoma Statutes 1931;
37 Okla. St. Ann. 1.

Sacramental wine is not intoxicating liquor under the laws of the State of Oklahoma. House Bill No. 264 provides that permits may be issued for its importation into Oklahoma. If sacramental wine is not an intoxicating liquor within the meaning of the Constitution and laws of Okla-

homa, but by the provisions of House Bill No. 264, permits *may* be issued for its importation, is a permit *required* by such law to the extent that its importation without a permit is a violation of the Liquor Enforcement Act of 1936? We think not.

Assuming this Court will hold that sacramental wine cannot, under existing law, be brought within the provisions of House Bill No. 264, notwithstanding its provisions concerning such wine, that strips the act of all "required permits" down to the permits which may be issued for industrial and medicinal alcohol, and we are left with a law that *requires* a permit to accompany the importation of alcohol only. In the case of *Dunn* v. *United States, supra,* it was said: "Oklahoma * * * does not provide for a permit or licensing system with respect to intoxicating liquor imported or transported into the state." Hence, the enactment of House Bill No. 264. Does that act "provide for a permit or licensing *system* with respect to intoxicating liquor imported or transported into the state"? Report No. 1258, 74th Congress, prepared by Mr. Celler of the Committee of the House of Representatives on the Judiciary to accompany the Liquor Enforcement Act of 1936, in part reads:

> "The determination of whether an offense has been committed turns upon the existence of a state license or permit *system,* or a complete embargo on all bringing of liquor into the state * * *." (Italics our own.)

Surely, a law providing only that a permit *may* be issued for the importation of alcohol does not provide a "permit or licensing system with respect to intoxicating liquor imported or transported into the state." Clearly House

Bill No. 264 falls far short in its attempt to bring Oklahoma under the provisions of the Liquor Enforcement Act of 1936, when we contemplate the intent of Congress and the construction placed by the Circuit Court thereon, in *Dunn* v. *United States, supra.*

The Constitutional Prohibition Ordinance, ratified September 17, 1907, effective November 16, 1907, nowhere prohibits the importation, bringing or transportation *into* the State of Oklahoma of any intoxicating liquor of any kind. The Constitution prohibits the *(1)* manufacture, *(2)* sale, *(3)* barter, *(4)* giving away, or *(5)* otherwise furnishing, of intoxicating liquor within the state, and then provides punishment for any person who shall *(1)* manufacture, *(2)* sell, *(3)* barter, *(4)* give away, or *(5)* otherwise furnish, any intoxicating liquor, or shall *(6)* advertise for sale or solicit the purchase of such liquors, or who shall *(7)* ship or in any way convey such liquors from one *place within* this state to *another place therein*, except the conveyance of a lawful purchase as therein authorized. Then the Constitution provides authority for the legislature to set up State Liquor Agencies for the sale of "such liquors" for medicinal purposes. The Constitution does not attempt to prohibit the importation, bringing or tranportation of intoxicating liquor into the state from *without* the state. In fact, by prohibiting its manufacture within the state, but providing for the setting up of liquor stores by state agencies for the sale of intoxicating liquor, it clearly demonstrates an intention to not forbid the importation. How else could liquors be sold by the state agencies authorized by the Constitution except by importing the same, the manufacture within the state being banned? Pursuant to this constitutional au-

thority the Oklahoma legislature, in its session of 1907-08, enacted a law establishing a state agency, creating the office of superintendent, prescribing his duties, etc., providing that he shall arrange to have on hand intoxicating liquors sufficient to supply the demand; providing for the measuring, packing and labeling of such liquors (except alcohol); limiting the sale to not more than one package of vinous or spiritous liquor to one person on the same day nor more than three gallons of malt liquor to one person in one day. That enactment of the legislature was held constitutional by the Oklahoma Criminal Court of Appeals, in *Smythe* v. *State*, 2 Okl. Cr. 286, 101 Pac. 611. The act was repealed subsequently by the legislature. Importing such liquor was the only available source of supply, because the Constitution prohibited its manufacture within the state. Therefore, we find that the Constitution did not and does not now forbid the importation of intoxicating liquor into Oklahoma from without the state. The prohibition provision in the Constitution has never been amended.

There is not a single law upon the statute books of Oklahoma prohibiting the importation of intoxicating liquor into the state, except House Bill No. 264, and it only forbids the same without a permit, and, as we have demonstrated, confines it to industrial and medicinal alcohol.

The first attempt by the Oklahoma Legislature to enact any legislation regarding importation was in 1917, when it passed what was known as the "Bone Dry Law." Session Laws 1917, chapter 186, page 350, 37 Okl. St. Ann. 38. But that law, the Supreme Court in *Baldridge* vs. *State*, 80 Okl. 85, 194 Pac. 217, held, did not prohibit the bringing into the state of intoxicating liquors when said intoxicating liq-

ours have been lawfully purchased and are intended for personal use, provided the person for whose use said intoxicating liquors are intended personally transports such liquor into the state. The Supreme Court of Oklahoma had previously made the same holding in *Crosslands* vs. *State*, 74 Okl. 58, 176 Pac. 944. In reality, the "Bone Dry Law" of 1917 merely prohibited the receipt from a common carrier, by any person within the state, of intoxicating liquors shipped into the state from without the state.

Therefore, we earnestly insist that the laws of the State of Oklahoma do not prohibit the importation, bringing or transportation of intoxicating liquors into the state from without the state, and by the term "intoxicating liquors" we are not confining ourselves to industrial and medicinal alcohol and sacramental wine, but include the whole catalogue of intoxicating beverages so far invented by man.

Point C

(Specification of Error No. 4)

Petitioners' Special Requested Charges to the Jury, Nos. 2, 3, 4, 5 and 6, should have been given by the trial court to the jury.

STATEMENT

Petitioners requested the court to charge the jury, in addition to the main charge of the court, in their Special Requested Instruction No. 2, as follows, to-wit:

> "The proof in this case shows that the conspiracy, if any, between the defendants was organized and planned in the State of Oklahoma, and unless you believe that the defendant, William Flippin, did commit an overt act in the State of Arkansas as charged in the indictment, then the court instructs you that this court would have no jurisdiction over a conspiracy com-

mitted in the State of Oklahoma, and your verdict should be for the defendant, William Flippin." (R. 128)

Petitioners also requested the court to charge the jury, in addition to the main charge of the court, in their Special Requested Instruction No. 3, as follows, to-wit:

"You are instructed that a conspiracy among several defendants without the commission of an overt act, is not a violation of the conspiracy statute, and unless you believe beyond a reasonable doubt from the evidence herein that the conspiracy as charged was actually entered into by and between the defendants herein, and that an overt act to effectuate the same was committed in the Fort Smith Division of the Western District of Arkansas, then your verdict should be for the defendant, William Flippin." (R. 128-129)

Petitioners also requested the court to charge the jury, in addition to the main charge of the court, in their Special Requested Instruction No. 4, as follows, to-wit:

"Even though you may believe from the evidence that the defendant William Flippin did commit an overt act as defined to you by the court, still that defendant would not be guilty of conspiracy unless he joined in the alleged conspiracy agreement with the other defendants in the indictment." (R. 129)

Petitioners also requested the court to charge the jury, in addition to the main charge of the court, in their Special Requested Instruction No. 5, as follows, to-wit:

"You are instructed that to constitute a conspiracy there must be unity of design and purpose between the defendants, for a common design is the essence of a conspiracy, and though you may believe from the evidence that each of the defendants acted illegally with the same end in view, still the defendants would not be

guilty of conspiracy unless it appears that such acts were done pursuant to a mutual agreement between two or more of the defendants." (R. 129)

Petitioners also requested the court to charge the jury, in addition to the main charge of the court, in their Special Requested Instruction No. 6, as follows, to-wit:

> "The mere knowledge, acquiescence or approval of an unlawful act, without cooperation or agreement to cooperate, would not amount to a conspiracy within the meaning of the law." (R. 129)

Several of these Special Requested Instructions referred to the petitioner Flippin, however, the court permitted the same to be applicable and to inure to the benefit of all of petitioners. (R. 125) All of said Special Requested Instructions were refused by the trial court, to which refusal exceptions were taken (R. 128).

ARGUMENT

The main charge of the court does not cover the substance of these requested instructions and should have been given to the jury as a part of the law in the trial of the case. The indictment charges that petitioners conspired in the Fort Smith Division of the Western District of Arkansas and to effectuate the same committed certain overt acts (R. 5-8).

The court, in its main charge to the jury, defined the law of conspiracy (R. 117) and in connection therewith quoted the statute. The court thereafter gave the jury a resumé of the overt acts and then went further to elaborate on the meaning of conspiracy. The court charged the jury that if it found the defendants guilty of the conspiracy, as

alleged in the indictment, it would be the duty of the jury to convict. *Nothing is said by the court with reference to the duty of the jury to find that an overt act was committed within the venue or jurisdiction of the court.*

The entire record reflects that if a conspiracy was in existence between petitioners in connection with the matters herein charged, the same was formed and was in existence in the State of Oklahoma and not in the State of Arkansas. A reading of the record will readily disclose this to be true, therefore, we say that in order for the conviction to stand it was necessary for the jury to find that an overt act was committed within the jurisdiction of the court, i. e., in the Fort Smith Division of the Western District of Arkansas.

The record being such that it is, we submit, therefore, that it was incumbent upon the court to charge the jury as requested in the Special Requested Instruction No. 2.

We say, particularly for the reason that a part of the main charge of the court in connection with the foregoing was confusing and entirely too indefinite, that the Special Requested Instruction No. 2 should have been given.

The court, in part, charged the jury as follows:

> "If any one of these defendants committed an overt act, still if that defendant had no connection with the conspiracy, and was not induced by either of the parties alleged here to commit the act in furtherance of the conspiracy, *then you could not find him guilty on that overt act.*" (R. 126)

The charge of the court with reference to finding petitioners guilty of an overt act is very misleading and confusing and is not a proper statement of the law. The offense is conspiracy with an overt act committed to effectuate

the same within the jurisdiction of the court, unless it is clearly shown that the conspiracy itself was formed and existed within the jurisdiction of the court. On the same page of the record it is to be noted that the court was content with charging the jury simply that the conspiracy must have been formed and that an overt act must have been committed in the furtherance of the conspiracy. He did not charge the jury that it would be necessary that they find where the conspiracy was formed, or where an overt act was committed, except to charge the jury that they must find the formation of the conspiracy as charged in the indictment, which alleged the existence of the conspiracy in Arkansas, however, as stated *supra*, not only is the record devoid of proof as to the existence of the alleged conspiracy in Arkansas, but, on the contrary, clearly reveals that the agreement, if any, was formed and existed in the State of Oklahoma, hence, requiring the giving to the jury of the Special Requested Instruction No. 2.

For the same reasons, we respectfully submit that the Special Requested Instruction No. 3 should have been given the jury by the court.

In view of the ambiguity of the court's charge with reference to the conspiracy count and his charge indicating that the jury might find anyone of the petitioners *guilty of an overt act*, we respectfully say that the Special Requested Instructions Nos. 4, 5, and 6 should have been given and that it was error of the trial court to refuse these requested instructions to the jury.

Point D

(Specification of Error No. 5)

The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein the government's witness Tom Gilbert was interrogated and permitted to testify, over the objection of petitioners as to his testimony before the grand jury in this cause.

STATEMENT AND ARGUMENT

In the course of the interrogation of the government's witness, Tom Gilbert, without any apparent reason whatsoever, the United States Attorney interrogated said witness in detail with reference to his testimony before the Grand Jury. No plea of surprise was made and the interrogation went into great detail in an effort, not only to impeach the government's own witness, but it was an attempt to establish evidence against petitioners which was wholly inadmissible, incompetent and prejudicial.

The portion of the testimony and evidence complained of is to be found in the Record at pages 97-100.

At the close of this evidence and testimony, petitioners moved the court for a mistrial, which the court overruled and exception noted (R. 100).

After considering the matter, the court instructed the jury that this testimony should be considered only for the purpose of refreshing the witness' memory.

Following is the record in connection therewith:

> "The Court: Before doing that; I think I stated to the jury awhile ago in response to a motion made by Mr. McCutcheon here, that this testimony would be considered by the jury wherein the minutes of the Grand Jury were used by the prosecution here in questioning Mr. Gilbert; that it would only be considered by them for the purpose of refreshing his memory.

Mr. Barry: The witnesses memory.

The Court: Yes.

Mr. Brizzolara: Counsel for Government went further than that, and on that ground we move that it be excluded.

The Court: I excluded that question. Gentlemen of the jury, I think awhile ago that I gave you instructions with reference to the use of the questions propounded before the Grand Jury to the witness Gilbert. Out of an abundance of precaution, I am stating to you that that testimony could only be used for the purpose of refreshing the memory of Gilbert as to the matters about which were being inquired of at the time." (R. 104-105).

We respectfully submit that the damage done by the Government in its vicious and unfair method of gaining a conviction by delving into the secrets from the Grand Jury Room and thereby inferring at least that the jury in the trial of the cause could consider evidence in the Grand Jury Room as evidence in the trial of the cause, at least by *innuendo,* was an effort to have the trial jury believe that the indictment might be considered as evidence against petitioners, and that the same was improper and should not have been permitted by the court over the objection and exception of petitioners. By the same token, the mistrial requested by petitioners should have been granted. The fact that the court attempted to modify the damage done did not erase the damage and the effect of that type of testimony that must have been imprinted on the minds of the jury.

In the case of *Holt* vs. *United States,* 94 F. (2d) 90, the Circuit Court of Appeals for the 10th Circuit, in reversing the conviction wherein the court had attempted to cure an error in the trial of the case, stated as follows:

"It is the general rule that error in the admission of evidence is cured by withdrawing the evidence from the consideration of the jury and instructing the jury to disregard it.

"However, where the character of the evidence is such that it is likely to create so strong an impression on the minds of the jurors as to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a mistrial should be ordered.

"The statement purported to be a dying declaration. It was a full and complete narrative of what occurred between Alexander and his alleged co-conspirators from the beginning. It was before the jury from early in the trial until the close of the evidence. It must have made a deep and lasting impression on the minds of the jurors. It squarely contradicted Holt's defense that he did not know Alexander was an imposter, while the competent evidence on that issue was far from conclusive.

"We doubt that it was possible for the jury to efface the statement from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do.

"We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted."

Therefore, we respectfully submit that it was error for the court to permit the United States Attorney to follow such tactics in the prosecution of the case and that the evidence and testimony with reference to the testimony before the Grand Jury on the part of Gilbert was highly inflammatory, prejudicial, and that the mistrial asked for by petitioners should have been granted and that the attempt on

the part of the court to modify the same did not remove from the minds of the jury the impressions made.

It is unfortunate that a reading of the record, just in print and on paper, does not reflect the attitude of the prosecutor herein which, only the hearing of his voice and the seeing of his display of passion could only be preserved by sight and sound, which we regret that this Court does not have before it the recordation by film and sound since we know that if we had such record we feel that this Court would more easily understand our position in connection with this proposition.

Point E

(Specification of Error No. 6)

The decision of the Circuit Court of Appeals in affirming the judgment and sentence of the trial court was contrary to law and the admissible evidence adduced in the trial of said cause.

STATEMENT AND ARGUMENT

It is respectfully submitted that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court in that the charge of the trial court to the jury was and is contrary to law.

The trial court, in its main charge to the jury, stated as follows:

> "The court instructs you that on March 3rd, 1939, there came into effect what is known as the Conformity Act passed by the Legislature of Oklahoma and signed by the Governor and became effective on March 3rd, conforming to these requirements of the Federal Statute. The Oklahoma Law provided that it was unlawful to import, bring or transport any intoxicating liquors into that State except for scientific, sacramental, medicinal or mechanical purposes where the liquor con-

tained more than 4 per centum by volume of alcohol, unless such liquor was brought in there through a permit or a license. There is no testimony here of any permit or license in this case." (R. 121)

It is thereby noted that the court instructed the jury that on March 3rd, 1939, there came into effect the Conformity Act of the State of Oklahoma, *conforming to these requirements of the Federal Statute.* The court went further and referring to the Oklahoma law referring to liquor containing more than 4% of alcohol by volume insofar as it applied to the importation and transportation of the same into Oklahoma, however, the court wholly failed to charge the jury that the alcoholic content in the State of Oklahoma of liquor prohibited to be *sold* was 3.2% of alcohol by weight, such as is the yardstick set forth in Sec. (b) of the Liquor Enforcement Act of 1936.

It is true that in connection with this portion of the charge, counsel for petitioners did not take exception thereto, however, we submit that in the interest of justice this Court may properly take notice of the error and by virtue thereof reverse in the public interest. See *Gregg* vs. *United States,* cited *supra; Cox* vs. *United States,* 96 F. (2d) 41; and *Ayers* vs. *United States,* 58 F. (2d) 607.

A somewhat similar charge was given to the jury by the trial court in the Gregg case and the same Circuit Court in its opinion, held as we state the law above.

In the Gregg case, the trial court charged the jury that it might accept it as a fact that the use of intoxicating liquor for beverage purposes in Kansas was prohibited by the laws thereof and that the importation of intoxicating liquors

into Kansas was prohibited by law, and in connection therewith the trial court quoted portions of the Liquor Enforcement Act of 1936 to the jury.

The statement of the trial court to the jury in the Gregg case is substantially the same as the statement and charge to the jury of the trial court in this case. In the Gregg case the court instructed the jury, as above stated, that it was a fact of which judicial notice was required to be taken that the use of intoxicating liquor for beverage purposes in Kansas was prohibited by the laws thereof, and in connection therewith the court stated: *"Manifestly such instruction on the law given by the court was erroneous under the decision in the Arnold case."*

In this case the trial court instructed the jury that on March 3rd, 1939, there came into effect the Conformity Act passed by the Legislature of Oklahoma and signed by the Governor, and became effective on March 3rd, conforming to these requirements of the Federal Statutes. We submit that that instruction to the jury is for all intents and purposes exactly the same charge given by the trial court in the Gregg case and that as in the Arnold and Gregg cases, this case should be reversed and dismissed.

The trial court went further in its charge in stating to the jury that there was no testimony in the case of any permit or license. We feel that this was a statement by the court to the jury, shifting the burden of proof imposed on the prosecution by law, to the accused and for that reason was error.

CONCLUSION

For the reasons hereinabove set forth, it is respectfully submitted that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court herein and that the matter herein involved presents an important question of federal law, both adjective and substantive, and is one calling for this Court's power of supervision by Writ of Certiorari and that this petition therefore should be granted by the Court and thereafter this matter reviewed and the decision and judgment of the Circuit Court of Appeals for the Eighth Circuit herein should be reversed by this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 662

WILLIAM (BILL) FLIPPIN, JACK BAUGH, AND TUDE PURKEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 157–166) is reported in 121 F. (2d) 742.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 16, 1941 (R. 166). A petition for rehearing was denied on August 28, 1941 (R. 179). The petition for a writ of certiorari was filed September 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals could appropriately determine in this case that the Oklahoma liquor legislation, insofar as it defined as intoxicating and prohibited the sale of liquor containing more than 3.2% of alcohol by weight, is in conformity with the Federal Liquor Enforcement Act of 1936.

2. Whether the Oklahoma legislation makes provision for a permit to accompany all intoxicating liquor which may be lawfully imported into the State.

3. Whether the trial court properly rejected certain of petitioners' proferred instructions.

4. Whether it was proper to allow interrogation of a Government witness concerning his testimony before the grand jury to refresh his recollection.

STATUTES INVOLVED

The Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, sec. 3, 49 Stat. 1928; 27 U. S. C. Supp. V, sec. 223), and the pertinent provisions of the laws of Oklahoma relating to the sale and importation of intoxicating liquor are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

Petitioners were convicted (R. 16–18) in the United States District Court for the Western District of Arkansas upon the first count of a seven-count indictment (R. 5–8). This count charged them with having conspired with two others, who were not indicted, to import intoxicating liquor from the State of Arkansas into the State of Oklahoma, in violation of the Liquor Enforcement Act of 1936. Various overt acts were alleged, including the substantive offenses charged in the remaining six counts of the indictment.[1]

Petitioner Flippin was sentenced to imprisonment for two years and to pay a fine of $2,500 (R. 23–24); petitioner Baugh to imprisonment for eighteen months and to pay a fine of $1,000 (R. 24–25); and petitioner Purkey to imprisonment for one year and one day and to pay a fine of $1,000 (R. 25–26).

ARGUMENT

1. In *Dolloff* v. *United States*, 121.F. (2d) 157, the court below held that the Kansas liquor legislation defining as intoxicating and prohibiting the sale of liquor containing more than 3.2% of alcohol by weight was in conformity with the 4% of alcohol by volume standard prescribed in the Federal

[1] While these counts were excluded from the transcript in accordance with petitioners' praecipe (R. 8), their substance appears in the trial court's charge to the jury (R. 119–120).

Liquor Enforcement Act of 1936. It rested its conclusion not only upon the evidence in the record before it but upon scientific authorities and standard encyclopedias, which it found corroborated this evidence, and also upon the legislative history of the federal statute, as reflected in a congressional committee report, which indicated that Congress, in enacting the legislation, considered that the two measurements were equivalents, if not identical. This Court denied a petition for writ of certiorari in the *Dolloff* case on October 13 (No. 501, present Term).

In the instant case the court below adopted its conclusion in the *Dolloff* case as to the substantial identity of the two measurements in holding that the Liquor Enforcement Act of 1936 is applicable to the State of Oklahoma. Petitioners concede that the Oklahoma and the Kansas liquor legislation in their definition of intoxicating liquor and their prohibition of its sale are alike (Pet. 26), but argue (Pet. 21–35) that the court could not reach its conclusion in the instant case as to the identity of the standards in the state and federal legislation because in this case, unlike the *Dolloff* case, the record contained no proof on the subject. They therefore assert that the present case is in no different situation than were the cases of *Arnold* v. *United States,* 115 F. (2d) 523, and *Gregg* v. *United States,* 116 F. (2d) 609, in which the court below held that in the absence of proof it could not translate the term used in the federal statute (4% by

volume) into the term used in the Kansas legislation (3.2% by weight).

However, in the *Arnold* case the court said (p. 525): "We are cited to no recognized standards, tables or formulae, by aid of which such translation of terms may be effected." There is, moreover, nothing in that decision to indicate that the court's attention was directed to the legislative history of the federal statute. Without any basis for determining the relationship between the two measurements, the court, of course, properly refused to assume they were equivalents. The decision in the *Gregg* case was based upon the *Arnold* decision.

But in the instant case the court had the benefit of the scientific authorities, standard encyclopedias, and legislative history of the federal act which had been called to its attention in the *Dolloff* case. It would seem too clear for argument that the court was not required to blind itself to these sources of information, not dependent upon evidence, to which its attention had previously been called. Undoubtedly the court's decisions in the *Arnold* and *Gregg* cases would have been different if it had then had the benefit of this information, since, as was said by Mr. Justice Holmes in *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 64, "there are many things that courts would notice if brought before them that beforehand they do not know." Moreover, in the *Dolloff* case there was an attempt, by evidence, in support of a plea in

bar by the defendant, to question the identity of the two measurements, an attempt met by the Government's evidence and resolved in its favor. No such effort was made by the petitioners in the present case, and they do not question that the court's conclusion as to the equivalence of the two measurements is sustained by the informational sources upon which it relied. Under the circumstances there was, we submit, no necessity for the production of proof by the Government as to the relationship of the two measurements.

Edwards v. *United States,* decided by this Court on March 3, 1941 (No. 377, last Term), is obviously not in point. That case would be significant only if the petitioners here had been refused an opportunity to prove disparity between the two standards.

2. Petitioners contend that Oklahoma has not adopted either one of the two alternative control methods required by the federal statute, i. e. (1) the prohibition of all importation of intoxicating liquor, as defined by it, or (2) the setting up of a permit system in connection with "intoxicating liquor" which may be lawfully imported (Pet. 36–46). Concededly the state has not adopted the first control method but, without pursuing all of the ramifications of petitioners' argument, it is manifest (*infra,* pp. 12–13) that the state provides for and requires a permit to accompany importations of the only intoxicating liquor (industrial and medicinal alcohol and wine for sacramental purposes) which may be lawfully brought into the

state. *De Hasque* v. *A., T. & S. F. Ry. Co.,* 68 Okla. 183 (1918), relied upon by petitioners as indicating that sacramental wine cannot be considered as "intoxicating liquor," is not in point. In that case the court was obliged to exclude sacramental wine, even though intoxicating, from the purview of an earlier Oklahoma liquor statute, in order to avoid constitutional difficulties. The present legislation presents no such problem since it allows such wine to be imported under a permit. While the Circuit Court of Appeals for the Tenth Circuit in *Dunn* v. *United States,* 98 F. (2d) 119, held that the then (1938) Oklahoma legislation did not comply with the control requirements of the federal statute, the same court held in *Hayes* v. *United States,* 112 F. (2d) 417, that Oklahoma had met the requirements of the federal act by its new (1939) permit legislation. See also *Epps* v. *United States,* 112 F. (2d) 931 (C. C. A. 10); *Hastings* v. *United States,* 115 F. (2d) 216 (C. C. A. 8); *Hinkle* v. *United States,* 115 F. (2d) 217 (C. C. A. 8).[2]

3. Contrary to petitioners' contention (Pet. 46–50), their Special Requested Instructions Nos. 2–6, inclusive, were, we submit, properly rejected.

(a) Petitioners assert (Pet. 48–50) that if the proof showed a conspiracy, it established one

[2] Petitioners' contentions that the indictment was demurrable (Pet. 36) and that the court improperly charged the jury that the state law conformed to the requirements of the federal statute (Pet. 54–56) are sufficiently answered by the above discussion.

which was formed and in existence not in Arkansas, in which the case was tried, but in Oklahoma, and therefore that the court should have given their Requested Instruction No. 2 (Pet. 46–47).

Obviously this instruction was incorrect insofar as it required the jury to predicate petitioner Flippin's guilt upon the commission by him of an overt act within the jurisdiction of the trial court. The commission of such an act within the trial court's jurisdiction by any one of petitioner Flippin's coconspirators was of course sufficient. *United States* v. *Rabinowich,* 238 U. S. 78; *Hyde* v. *United States,* 225 U. S. 347; *Palmero* v. *United States,* 112 F. (2d) 922 (C. C. A. 1); *Brock* v. *Hudspeth,* 111 F. (2d) 447 (C. C. A. 10); *Baker* v. *United States,* 21 F. (2d) 903 (C. C. A. 4), certiorari denied, 276 U. S. 621.

While it is true that the trial court did not specifically charge the jury that it must find the commission of an overt act within the court's jurisdiction, it was justified in failing to give such an instruction since there was abundant *undisputed* testimony establishing various overt acts relating to the purchase of liquor by one or more of the conspirators in that portion of Arkansas within the court's jurisdiction (R. 32–35, 37, 38, 41, 43, 47, 70, 75–77, 79, 81, 83, 85–89, 90, 91, 93, 96, 99, 100, 109, 113). Moreover, the trial court charged the jury that the indictment alleged that the conspiracy was entered into within its juris-

diction (R. 116) and that the jury could not convict unless it found beyond a reasonable doubt that the defendants were guilty of the conspiracy *as alleged in the indictment* (R. 119). There is clearly no basis for the petitioners' view that the allegation in the indictment as to the existence of the conspiracy in Arkansas was unsupported by evidence. There was considerable proof establishing a concert of action, pursuant to a continuing conspiracy, between at least three of the conspirators in that part of Arkansas within the trial court's jurisdiction (R. 64, 68, 70, 75–77, 79, 81, 83, 85–89, 90, 91, 93, 96, 99, 100, 109, 113).

(b) Requested Instruction No. 3 (Pet. 47) was obviously incorrect since it would have prevented a conviction, even though the conspiracy was in existence in Arkansas, unless there was, in addition, an overt act committed in that jurisdiction. *Hyde* v. *United States, supra.*

(c) Requested Instructions Nos. 4, 5 and 6 (Pet. 47–48) were properly refused since they were covered in substance by instructions given by the court (R. 118–119, 126–128).

4. Prejudicial error is alleged to have been committed when the trial court permitted the Government to interrogate one of its witnesses, Gilbert, as to his testimony before the grand jury (Pet. 51–54). The record indicates, however, that the purpose of this interrogation was to refresh the recollection of the witness and that the court was careful so to limit it (R. 99, 104–105). This Court

has held that the "use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge [citing authorities]. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection." *Socony-Vacuum Oil Co.* v. *United States,* 310 U. S. 150, 233. There appears to have been no abuse of discretion, and hence no prejudicial error was committed. See *Metzler* v. *United States,* 64 F. (2d) 203, 205 (C. C. A. 9); *Di Carlo* v. *United States,* 6 F. (2d) 364, 368 (C. C. A. 2), certiorari denied 268 U. S. 706; 8 *Wigmore,* Evidence (3d ed., 1940) sec. 2362.

CONCLUSION

The case was correctly decided below, presents no important question of federal law, and involves no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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OCTOBER, 1941.

APPENDIX

The Act of June 25, 1936, sec. 3, 49 Stat. 1928 (27 U. S. C. Supp. V, sec. 223), provides:

> (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt to do so, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State.

The laws of the State of Oklahoma provide as follows:

Okla. Stat. Annot., T. 37, § 151 (Laws 1933, ch. 153, p. 338, § 1):

> Beverages containing more than three and two-tenths (3.2%) percent alcohol by weight are hereby declared to be intoxicating; all other beverages are declared to be non-intoxicating.

Okla. Stat. Annot., T. 37, § 1 (R. L. 1910, § 3605; Laws 1933, ch. 153, p. 338, § 2):

> It shall be unlawful for any person, individual or corporation to * * * sell * * * any liquors or compounds of any kind or description whatsoever whether medicated or not which contain more than three and two-tenths (3.2%) percent of alcohol, measured by weight, and which is capable of being used as a beverage * * *.

Okla. Stat. Annot., T. 37, § 41 (Laws 1939, p. 16, § 1):

> It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four (4%) percent of alcohol by volume, without a permit first secured therefor as hereinafter provided.

Okla. Stat. Annot., T. 37, § 42 (Laws 1939, p. 16, § 2):

> Permits may be issued, as in this Act provided, for such importation and transportation of alcohol for scientific or mechanical purposes by and to such scientific institu-

tions, universities and colleges as are authorized to secure the same free of tax under the laws of the United States, and alcohol by and to hospitals and sanitariums for medicinal use in such hospitals and sanitariums, and for the importation and transportation of alcohol to and by any apothecary, druggist, pharmacist, or manufacturing agency, who shall need same for such purpose * * *. Permits may also be issued for the importation and transportation, or causing to be imported or transported into this State, of wine for sacramental purposes. No permit shall be issued to any person, or for any purpose, or for the importation of any intoxicating liquor, except as specifically authorized under this Section.

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